STATE OF MICHIGAN

COURT OF APPEALS

RUBYE BAKER, Personal Representative of the ESTATE OF STACEY BAKER,

Plaintiff-Appellant,

v

ST. JOHN HEALTH SYSTEMS, a/k/a ST. JOHN HOSPITAL & MEDICAL CENTER, DR. THERESE ROTH, and DR. MARSON MA, JR.,

Defendants-Appellees.

UNPUBLISHED
January 23, 2007

No. 267284
Wayne Circuit Court
LC No. 03-340451-NH

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 2.714(E).

Decedent was taken by ambulance to St. John Hospital. Defendants were allegedly alerted by radio that decedent was en route and had been coded as priority one status because she was experiencing shortness of breath, anxiety, and combativeness. Plaintiff alleged that physicians were not present to treat decedent upon arrival, and that during the interval between arrival at 4:12 a.m. and the physicians' presence at 4:21 a.m., decedent went into cardiac arrest. Emergency protocols were unsuccessful, and decedent was pronounced dead at 4:50 a.m. Plaintiff's theory of recovery was based on a loss of opportunity for decedent to survive. We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Plaintiff's cause of action is governed by MCL 600.2912a(2). The statute provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

In *Fulton v Beaumont Hosp*, 253 Mich App 70, 79-80; 655 NW2d 569 (2002), this Court acknowledged that the statutory language was ambiguous regarding what "opportunity" the Legislature required to be greater than 50 percent. The majority in *Fulton* resolved the ambiguity by concluding that a defendant's actions must have caused a plaintiff's chances of survival or of a better result to decrease *by* at least 50 percent, rather than decrease *from* at least 50 percent. *Id*., 82-84. In other words, the only relevant calculation is the *difference between* the starting and ending odds, rather than a threshold question of only whether the plaintiff's odds with proper care were above 50 percent.

In the subsequent case of *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 537-539; 687 NW2d 143 (2004), this Court disagreed with the conclusion in *Fulton*, but concluded that it was bound to apply it nonetheless.[1] This Court observed that application of the *Fulton* majority's interpretation would preclude a suit where a plaintiff's chances of survival decreased from 84 to 35 percent, but permit it where the same plaintiff's chances of survival decreased to 34 percent, a clearly anomalous result. *Id*., 538 n 13. The *Ensink* panel did not deem it rational to conclude that the Legislature intended to bar plaintiffs from bringing suit on the basis of one percentage point, or less, in a probability estimate. *Id*. Rather, the more sensible interpretation was that the Legislature intended to preclude excessively speculative lawsuits, defined as any in which the plaintiff's opportunity to survive would in any event be no greater than 50 percent. *Id*. However, *Ensink* applied *Fulton* to somewhat ambiguous expert testimony, which was interpreted as stating "a lost opportunity to achieve a better result of forty-five percent." *Id*., 539. Because 45-five percent is less than the 50 percent differential required by *Fulton*, the *Ensink* panel concluded that MCL 600.2912a(2) was not satisfied. *Id*.

We agree with the *Ensink* panel that the interpretation of MCL 600.2912a(2) set forth by the majority in *Fulton* "leads to anomalous results," *Ensink*, *supra* at n13, and that the dissent in *Fulton* is "a more accurate rendition of the legislative intent." *Id*., 538. However, the facts of this case produce the same result under either interpretation of the statute.

Plaintiffs' expert, Dr. Michael S. Blue, testified that the only objection to defendants' actions was their failure to treat plaintiff immediately upon her arrival at the hospital. He stated that "[i]f they'd gotten to her immediately, I would say there was at least 50 [sic] percent chance they could have made a difference at that point in time," where making a difference was defined as preventing her from coding.[2] He explained that it was possible that plaintiff would have experienced further problems later in time, but "with appropriate medical attention, there is a 51 percent probability that the outcome might have been different." Although use of words like "might" or "could" implies speculation, when read in context, his testimony appears reasonably clear that his expert medical opinion is that proper treatment would have made a better outcome of at least 50 percent more likely. Moreover, at other points in his testimony he indicated that

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[1] A special panel was not convened.

[2] "Coding" is a "[t]erm used in hospitals to describe an emergency requiring situation trained members of the staff, such as a cardiopulmonary resuscitation team or the signal to summon such a team." *Stedman's Medical Dictionary* (26th ed), p 360.

"making a difference" did not merely refer to preventing plaintiff from going into cardiac arrest, but to living or not living through the medical emergency. Although he did not explicitly testify, in so many words, that defendants' actions caused plaintiff's opportunity to survive to decrease by at least 50 percent, a fair reading of his testimony establishes that to be his expert medical opinion.

Defendants contend that at some point plaintiffs submitted an affidavit from Dr. Blue allegedly stating that when plaintiff coded, her chances for survival dropped to five percent or less. Under *Fulton*, this would not constitute a sufficient decrease in her chances of survival. However, the scope of our review is generally limited to the lower court record. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). We have searched the record and we cannot find a copy of this affidavit therein. This Court generally will not permit expansion of the record on appeal, *Detroit Leasing Co v City of Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005), but we have not even been given a copy of the affidavit in any materials submitted to us. We therefore find no factual support for defendants' assertion that plaintiff's opportunity to survive was reduced by less than the 50 percent required under *Fulton*. Furthermore, we agree with the concurrence that Dr. Blue's purported admission does not, in any event, remove this case from the purview of MCL 600.2912a(2).

The trial court concluded that summary disposition was appropriate because Dr. Blue observed that it was possible plaintiff might have suffered further problems later in the day, or the next day, even if defendants had given her proper treatment when she arrived at the hospital. The trial court therefore concluded that plaintiff could not establish that she had a sufficient likelihood of survival. However, Dr. Blue repeatedly pointed out that anything beyond the emergency for which plaintiff came into the emergency room was purely speculative either way. Furthermore, it is impossible to know with any certainty what might happen to *anyone* at a further time or date. The significant consideration is Dr. Blue's testimony that with proper treatment, plaintiff would have had at least a 50 percent greater chance of surviving the *known* emergency, and therefore she "suffered an injury that more probably than not was caused by the negligence of the defendant or defendants" as required by MCL 600.2912a(2).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Alton T. Davis